Nos. 90-954; 90-1004

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER
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I. INTRODUCTION

The issue presented in this case is what standard a federal district court should apply to requests to modify consent decrees that have been entered to reform jails, prisons and other public institutions. This issue arises in the context of what is often referred to as "institutional reform litigation." The unique features of institutional reform litigation differentiate it from other disputes in which a court enters a remedial order by either consent decree or injunction. (*See* Brief of Petitioner Sheriff Robert C. Rufo, "Sheriff's Br.", 15-18.) Any standard proposed for modifying consent decrees in institutional reform litigation must be flexible in order to recognize and accommodate these features. (*See* Sheriff's Br. 31-37.) Respondents and their *amici*, however, as shown below, do not address the standard proposed by the Sheriff, almost wholly ignore the context in which requests to modify institutional reform consent decrees are brought, and misstate what they assert are the facts of this case.

II. RESPONDENTS FAIL TO ADDRESS THE ARGUMENT RAISED BY THE SHERIFF.

Respondents, in their brief, formulate their own questions presented [1] and ignore the position taken by the Sheriff. Instead, they focus upon the position taken by Petitioner Thomas C. Rapone, Commissioner of Correction (the "Commissioner"). The Commissioner takes the position that if all constitutional violations in the operation of a public institution, such as a jail or prison, have been cured, a federal district court must grant a requested modification. (Brief of Commissioner, "Com'r. Br.", 30.)

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[1] The questions presented by respondents do not resemble the questions upon which the Court granted *certiorari*. Had respondents wished to raise such issues they could have done so by cross-petition. Having failed to do so, however, they cannot now present questions which were not perfected below. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-79 (1938).

The Sheriff, in contrast, has proposed a standard, consistent with circuit court precedent, that allows a modification if there has been a significant adverse effect on a public official or on a particular public interest, and if the consent decree as modified will not derogate from the consent decree's purpose as defined by the federal law that brings the parties before the court. (Sheriff's Br. 32.) Under the Sheriff's standard, a moving party is not free to modify the consent decree at any time; a party must make a particularized showing of the need for the modification.

This Court has recently considered the scope of a district court's authority when entering or modifying a consent decree that is intended to vindicate federally secured rights. In *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), this Court considered a consent decree that had been entered to vindicate the rights secured under Title VII of the Civil Rights Act of 1964. When the city defendant began laying off plaintiff minority firefighters under its seniority system, which favored white firefighters, the district court modified the consent decree to enjoin the layoffs. This Court held that the modification was improper, because a court may not add to a consent decree a provision it could not order after trial. *Id.* at 576 n.9, 579, 611 n.9 (Blackmun, J., dissenting). In *Local Number 93* v. *City of Cleveland*, 478 U.S. 501 (1986), also a Title VII case, this Court held that a court may enter (and presumably enforce) a consent decree that contains provisions that it could not order after trial.

Although both of these cases arose under Title VII, the reasoning in support of these holdings cannot be limited to that statute. The statutory scheme of Title VII functioned only to define the limits of a court's powers on the facts of the particular cases. There is no reason to suppose that the limits of a court's authority are different when the court sits, as in the present case, to vindicate rights secured under the Constitution. Indeed, it is precisely in the context of a federal court acting to vindicate such rights through orders entered against

state and local officials that this Court has repeatedly noted the limits on the court's authority. *Board of Education of Oklahoma City* v. *Dowell*, ___ U.S. ___, 111 S.Ct. 630, 637 (1991); *Youngberg* v. *Romeo*, 457 U.S. 307, 322 n.29 (1982) (*citing Rhodes* v. *Chapman*, 452 U.S. 337, 352 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979)); *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977). Also, there is no reason to treat a request to modify a consent decree by adding a provision, as in *Stotts*, differently than a request to modify a consent decree by removing a provision, as in the present case. Each implicates a court's equitable power to reform its own order in the context of the federal law the court sits to vindicate.

The Sheriff's proposed standard is in accord with and follows from this Court's holdings in *Stotts* and *Local 93*. The Sheriff's standard would allow the enforcement of a consent decree once agreed to and would limit a court's authority when modifying a consent decree to what the court could have ordered after trial. Thus, under the Sheriff's proposal, the purpose of a consent decree is defined by the law which the consent decree was entered to vindicate, and the modification is allowed if the decree as modified would not derogate from that purpose. To define the purpose otherwise would permit a court to enter orders that it could not after trial, contrary to this Court's holding in *Stotts*.

Respondents also mischaracterize the Sheriff's brief in claiming that the Sheriff argues that this Court's holding in *Bell* v. *Wolfish* mandates the modification requested here. (Brief of Respondents, "Resp. Br.", 44.) The Sheriff does not contend that the clarification of an inmates' constitutional rights enunciated in that case alone requires a modification.[2] However, *Bell* is relevant to a court's analysis of the Sheriff's proposed second criterion, since that case further defines the constitutional rights of inmates the court sits to vindicate.

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[2] *But see Theriault* v. *Smith*, 523 F.2d 601 (1st Cir. 1975), allowing a requested modification solely because a Supreme Court decision subsequent to signing of the consent decree clarified that the decree went farther than was required under federal statutory law.

III. RESPONDENTS AND THEIR *AMICI* HAVE PROPOSED STANDARDS FOR MODIFICATION OF CONSENT DECREES THAT ARE INAPPROPRIATE FOR INSTITUTIONAL REFORM LITIGATION AND SHOULD NOT BE ADOPTED.

Petitioners and their *amici* agree that a standard more flexible than the stringent standard enunciated in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), should be adopted for modification requests in institutional reform litigation. Respondents and their *amici*, however, propose standards that are even more stringent than the *Swift* standard and would foreclose modification.

A. The Respondents' Standard, Which Requires a Finding Of Changes "Unforeseen and Unforeseeable," Is Stricter Than The *Swift* Standard.

In *Swift*, the Court required a showing that a change in circumstances be "unforeseen". Respondents' proposed standard, however, requires that a change not only be "unforeseen" but "unforeseeable" as well. (Resp. Br. 35.)[3] Under respondents' standard, a court would not only have to determine what the parties took into consideration as a basis for their agreement at that time — in this case over ten years ago — but would also have to determine, with the assistance of hindsight, everything that could have possibly happened. The determination of whether something was "foreseeable" would be limited only by a court's imagination after the fact.

Courts, in considering modification requests in institutional reform litigation, have relied not on the "unforeseeability" of the changed circumstances, but on whether experience has proven the decree inefficient or harmful, regardless of whether the new circumstances could have been deemed "foreseeable"

[3] The respondents' third and fourth criteria, requiring a showing that the modification is "equitable in light of concessions" and that there is "no feasible alternative" to the requested modification (Resp. Br. 36-37), are likewise found nowhere in the stringent *Swift* standard for modification.

at the time of entry of the decree. *Heath* v. *DeCourcy*, 888 F.2d 1105, 1107, 1110 (6th Cir. 1989) (jail population foreseeably began increasing over expectations only one month after entry of decree, but modification was justified because experience proved decree ineffective); *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 969 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983) (modification should be allowed, not based on unforeseeability of conditions, but because experience has proven the decree ineffective). Nor have courts denied needed modifications because a defendant did not foresee the extent of a foreseen change. *Plyler* v. *Evatt*, 846 F.2d 208 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988) (even where defendant foresaw increase in prison population, but did not foresee that the increase would exceed predictions, court allowed modification). Indeed, even the District Court judge in the present case recognized that foreseeability should not be a part of a flexible standard. (Sheriff's Cert. Pet. 11a.)

Public institutions must adapt to continually changing conditions and conflicting demands. It is impractical for the parties to allow for every conceivable or "foreseeable" contingency in a consent decree. It is for these reasons that the law allows, and in this case the Consent Decree specifically provided for, modification. (Sheriff's Cert. Pet. 21a.)

B. Respondents' Standard Is Internally Inconsistent.

Respondents' second criterion requires that a defendant show both that a modification was timely requested and was requested in good faith. (Resp. Br. 35.) The standard also requires a showing that there are no "feasible alternative[s]." (Resp. Br. 37.) These requirements are mutually exclusive. On the one hand, respondents argue that a defendant must move to modify as soon as it knows of the need to modify; on the other hand, to show its "good faith", a defendant must demonstrate that it has attempted to comply with the terms of the decree in spite of the changes in circumstance and has no

feasible alternatives by which it can comply. Hence, a defendant is faced with a "Catch-22": if it moves as soon as it knows of the problem with compliance, it will not have had an opportunity to try to comply and thus demonstrate its good faith or lack of feasible alternatives; if it tries to comply and exhaust its remedies, it will not have acted "timely."

The circuit courts that have considered the modification issue have not relied on the "timeliness" of a motion in determining its adequacy, nor have they made "good faith" a prerequisite. Indeed, had timeliness and good faith been required, many of the courts could not have granted the requested modification. In *Plyler* v. *Evatt*, 846 F.2d at 211, where the prison population skyrocketed for two-and-a-half years before modification was requested, defendants' motion to modify would have been considered untimely under respondents' standard. Under the "good faith" standard, the court in *Carey* could not have granted the requested modification, because it found that the hardships requiring the modification were largely "self-imposed." *New York State Association for Retarded Citizens, Inc.* v. *Carey*, 706 F.2d at 966. And, had good faith been a criterion in *Duran* v. *Elrod*, 760 F.2d 756, 762 (7th Cir. 1985), the court there could not have granted the modification, since the court made findings tantamount to bad faith by the defendants. The court, however, granted the modification since denial would have only served to punish the public. *See also Heath* v. *DeCourcy*, 888 F.2d at 1107 n.2 (good faith not controlling in court's decision).

In this case, respondents claim that the Sheriff did not act "timely" because he did not move for modification immediately after *Bell* v. *Wolfish* was decided in 1979, or at least by 1985. (Resp. Br. 44.) On the other hand, they assert that the Sheriff should have waited until he had substantial evidence, after the jail was built, of specific instances of harm to the public, and that based on his experience in administering the new jail there was no alternative to double-bunking. (Resp. Br. 46-49.) The Sheriff could not do both.

C. Respondents' Standard Fails To Balance The Judicial Aspects Of A Consent Decree With Its Consensual Traits.

Respondents' argument and proposed standard place undue reliance upon the contractual aspect of consent decrees, ignoring the long line of precedent, beginning with this Court's decision in *Swift*, holding that contract principles do not apply to consent decrees, and ignoring the fundamental judicial nature of consent decrees. (Sheriff's Br. 21-22.) The respondents' third criterion, in particular, oversimplifies the nature of consent decrees as contracts to the extent that all judicial characteristics are absent. This criterion requires that a request for modification "must be equitable to the plaintiffs in light of the concessions made by them," so that if a defendant is relieved of a certain undertaking contained in a consent decree, then the plaintiff must be relieved of "its correlative undertaking." (Resp. Br. 36.) Respondents' attempts to apply rescission principles to motions to modify consent decrees are particularly inapt, since in institutional reform litigation interests that were not a party to the agreement may be adversely affected by its implementation. *Duran* v. *Elrod*, 760 F.2d at 760 (it is not possible to fit decrees involving many classes of persons into the "familiar framework of contract law," and in deciding modification of decree judge cannot appeal solely to the sanctity of contracts — he must consider impact on both parties as well as the public); *Plyler* v. *Evatt*, 846 F.2d at 212 (holding that "the district court clearly erred in assessing the degree of potential harm to the inmates as contrasted with the risks to the public").

The circuit courts that have considered requests for modification of consent decrees in institutional reform litigation have made no such quid pro quo analysis. *See Newman* v. *Graddick*, 740 F.2d 1513, 1521 (11th Cir. 1984) (court was to consider present prison conditions to determine extent to which they have been brought into alignment); *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114, 1120 (3rd Cir.

1979), *cert. denied*, 444 U.S. 1026 (1980) (court did not attempt to relieve plaintiffs of any correlative undertaking in lessening defendants' agreed-upon burdens); *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 970-971 (court adopted flexible standard for modification of consent decrees without requiring that plaintiff be relieved of a correlative undertaking).

Respondents mistakenly rely on *Plyler* v. *Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991) ("*Plyler II*"), in support of the proposition that plaintiffs must necessarily receive some benefit or relief from an obligation when a modification is granted to defendants. (Resp. Br. 36.) In fact, in neither *Plyler II*, nor in its previous decision in that case, reported at 846 F.2d 208 (1988) ("*Plyler I*"), did the Fourth Circuit impose any rigid contract principles when considering a modification of a consent decree, but adopted a more flexible approach. In *Plyler I*, the court reasoned, "[a]lthough double-celling will be contrary to a specific term of the consent decree, the prisoners have received the essence of their bargain." *Plyler I*, 846 F.2d at 212. That court reaffirmed this approach in *Plyler II* where it held that attention should not be confined to the indisputable fact that modification would necessarily abrogate a specific benefit conferred by the decree. *Plyler II*, 924 F.2d at 1327 (citing *Plyler I*, 846 F.2d at 212-13).

In addition, respondents blithely state that if desired, parties to a consent decree may agree that modification will be governed by a more flexible standard than the law customarily provides.[4] (Resp. Br. 31.) This Court in *Swift* precluded such a proposition, stating that a federal court would "by force of principles inherent in the jurisdiction of the chancery," retain such powers, regardless of whether the parties had specifically provided for them in the decree. *United States* v. *Swift & Co.*, 286 U.S. at 114. Moreover, parties cannot unilaterally decide

[4] Of course, given the range of "flexible" standards articulated by the circuit courts, along with the adherence to a stringent standard below, it is unclear what standard of modification the law now "customarily" provides.

that a more strict or more flexible standard for modification should apply. To do so would be to rob a court of its inherent equitable powers by permitting the parties to expand or contract its jurisdiction. "The parties [to a consent decree] cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651 (1961).

D. Respondents' Standard Ignores Fundamental Principles Of Federalism.

Respondents' fourth criterion requires a defendant to show that there is "no feasible alternative to the proposed modification which preserves the original relief." (Resp. Br. 37.) Under this criterion, a public official who is faced with two different alternatives for adapting to a changed condition — one of which does not modify the consent decree and the other requiring a modification — must choose the former, even if it is more burdensome, less efficient, less effective and more costly than the latter, and even if it fails to adequately protect the public interest. Hence, under respondents' proposed standard, a consent decree becomes an agreement by which public officials forever relinquish all discretion to choose what, out of a range of alternatives, is the best means to adapt to changed circumstances. This position is contrary to the decisions of this Court and to the decisions of the circuit courts that have considered the modification issue.

This Court has recognized that jail and prison administrators in particular "should be accorded wide-ranging deference in the adoption and execution of policies and practices" and that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our government, not the Judicial." *Bell* v. *Wolfish*, 441 U.S. at 547, 548 (citations omitted). The Court further held that "it would 'not [be] wise for [it] to second-guess the expert administrators on matters on which they are better informed'." *Id.* at 531 (*quoting Wolfish* v. *Levi*, 573 F.2d 118, 124 (2d Cir. 1978)); *accord Duran* v. *Elrod*, 760 F.2d at 759.

This principle of deference to the professional and autonomous judgment of public officials does not end when a court enters an injunctive decree against them requiring that they bring their institutions into compliance with constitutional standards. *Board of Education of Oklahoma City* v. *Dowell*, ___ U.S. ___, 111 S.Ct at 637. Neither should a consent decree preclude officials from exercising autonomous professional discretion over the means by which they will adapt to changing circumstances. The court in *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 971, specifically rejected the argument that "defendants irrevocably exercised their professional judgment when they agreed" to the consent decree there, reasoning that "defendants' agreement was premised on their belief, now shown to have been untenable," that they could comply with the terms of the decree within a reasonable time.

No case cited by petitioners or respondents stands for the proposition that there must be no feasible alternative to the proposed modification which preserves the original relief. *Plyler* v. *Evatt*, 924 F.2d at 1328, cited by respondents in support of this proposition, provides only that a district court may determine appropriate equitable relief necessitated by a changed circumstance; nowhere does that court hold that the relief requested must be the least drastic alternative available. Likewise, *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1121, cited as support for this proposition by respondents, emphasizes the need for flexibility in adapting to changed circumstances, and says nothing about limiting changes to what plaintiffs deem the least drastic.

The respondents and their *amici*, in arguing for the preservation of the incentive to enter into consent decrees, improperly elevate the value of finality of consent decrees over all other considerations. Consent decrees may be convenient for the court and may be a practical means for the parties to settle rather than litigate their dispute. However, the practical considerations cannot outweigh, as the respondents and *amici* would

have it all other considerations. To so weigh the value of finality in the context of consent decrees is to reduce to insignificance the protection a court may give to the public interest and to deprive a court of its inherent equitable power to reform its own order when it produces a harmful or inequitable result.

E. Respondents' Standard Would Increase Litigation.

Respondents' first criterion requires that a change in circumstances be both unforeseen and unforeseeable, and the third criterion requires defendants to show that a proposed modification is "equitable" in light of the concessions plaintiffs have made in entering the consent decree. The first criterion imposes on the court the burden of determining what the parties actually considered as possible changes in circumstance and what they reasonably should have considered given the information available to them. The third criterion imposes on the court the burden of recreating each party's negotiating positions to determine what was the "correlative undertaking" by plaintiff for each obligation assumed by a defendant. Such an exercise in *ex post facto* reconstruction is time-consuming and costly and is likely to lead to inconsistent results.

F. Respondents' Standard Is Inequitable.

The five criteria that respondents would have this Court adopt, ironically, only apply to an institutional *defendant* seeking a modification. (Resp. Br. 34 n.18.)[5] Relying on the Court's decision in *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), respondents suggest that plaintiffs in institutional reform litigation need not be concerned by the foreseeability of changes or by the contractual aspects of the consent decrees. Rather, plaintiffs are entitled to a modification as long as it is needed to achieve the purpose of the decree,

[5] Similarly, *Amicus* the United States proposes a different standard for state and local government defendants when the United States is the plaintiff than when the United States is a defendant. (Brief of *Amicus* the United States, 28 n.17.)

regardless of whether the circumstance preventing achievement of the decree was "foreseeable", and regardless of whether the defendants conceded anything to arrive at the particular agreement.

This double standard proposed by respondents is inequitable to institutional defendants and should not be adopted. The standard proposed by the Sheriff, on the other hand, treats plaintiffs and defendants equitably. It allows plaintiffs a modification if additional relief is needed to vindicate a federally secured right or if a change in law affords them additional rights. *System Federation No. 91* v. *Wright*, 364 U.S. at 648-50. It allows defendants a modification if the decree has an adverse impact on their ability to operate the institution or on a particularized public interest. (Sheriff's Br. 37.) In brief, the standards proposed by the respondents and their *amici* would permit a plaintiff to obtain a modification of a consent decree while either denying that opportunity to the public official defendant or foreclosing such modification as a practical matter.[6]

G. Respondents' Standard Eliminates The Incentive For Defendants To Settle.

The parties agree that any standard adopted by this Court for modification of consent decrees should preserve the incentive to settle institutional reform litigation. (Resp. Br. 27-28, Sheriff's Br. 36.) Respondents and their *amici*, however, over-

[6] *Amicus* ACLU proposes a standard that would permit a modification, but only if "the modification is necessary to achieving the goal of the decree." (*Amicus* ACLU Br. 35.) This permits a modification which favors plaintiffs, but provides no mechanism for a modification requested by a defendant, even if the change would avoid a significant adverse effect on the public interest and leave the plaintiffs with their rights fully vindicated.

Amici Inmates of the Lorton Central Facility, like the ACLU, propose a standard which would allow a permanent modification if needed to achieve the consent decree's purpose (Brief of *Amici* Inmates of the Lorton Central Facility, 17), but allow only a temporary change if "enforcement [of the consent decree] would demonstrably harm the public welfare." (*Id.* at 24.)

emphasize the finality of the decree as the ultimate incentive to settle. (Resp. Br. 41.) Any standard that elevates finality over flexibility will, ironically, discourage settlement because defendants will not choose to forfeit their ability to later request needed changes:

> An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality.

Philadelphia Welfare Rights Organization v. *Shapp*, 602 F.2d at 1120.

Moreover, the criteria of respondents' standard are virtually impossible to meet, would preclude modification and, therefore, would discourage defendants from entering into consent decrees. The requirement that defendants demonstrate that a change be "unforeseeable" is an impossible burden since all changes are foreseeable in hindsight. (*See* discussion at 4-5, *supra*.) Also, the requirements that a modification request be both timely and in good faith are mutually exclusive, and again, a defendant could not meet that burden. (*See* discussion at 5-6, *supra*.) Similarly, the third criterion, requiring a rescission-type of analysis, would be impossible to meet, since after many years of litigation and many additional years of compliance, the parties simply cannot be put back into their previous positions. (*See* discussion at 7-9, *supra*.) Finally, it would be virtually impossible for a defendant to show that there is no "feasible alternative" to the relief requested. In this case, for example, the release of prisoners is always an alternative — albeit an undesirable alternative that is harmful to the public interest and safety — to double-bunking. Similarly, plaintiffs

could always argue that any problem in meeting the demand for more jail space can be solved "simply" by spending more money on the problem.

In contrast, an institutional defendant that has had an injunctive decree entered against it by a court rather than by consent need only show that it has acted in compliance with the injunction for a reasonable period of time and that it does not intend to return to its former ways in order to have the injunction dissolved. *Board of Education of Oklahoma City* v. *Dowell*, ___ U.S. ___, 111 S.Ct. at 637. A defendant, faced with the choice of either forever surrendering its ability to adapt to changed circumstances through the immediate "certainty" of a consent decree or accepting what the court may order within its constitutional limitations, will choose the latter since an order may be modified as circumstances change.

IV. RESPONDENTS RELY ON "FACTS" NOT FOUND BY THE DISTRICT COURT, UNSUPPORTED IN THE RECORD AND IRRELEVANT TO THE QUESTIONS PRESENTED.

A. The Sheriff's Proposal Was Not Fixed, And The Court Was Invited To Modify The Proposal In Light Of The Evidence And Its Findings To Provide A Modification That Would Permit Double-Bunking.

The respondents and their *amici* have asserted two reasons that allegedly render the Sheriff's double-bunking proposal unconstitutional.

First, they have pointed to the design of the cell doors as restricting the vision of a jail officer standing away from the door. However, if the court concluded that an increased viewing area were needed, the design of the door could be modified to provide an increased viewing area and that requirement made part of an order allowing the modification.

Second, they argue that under the Sheriff's proposal inmates would be out of their cells twelve hours per day, while at the

pretrial facility that was the subject of this Court's decision in *Bell* v. *Wolfish*, inmates were out of their cells sixteen hours per day. Again, the number of hours of out-of-cell time was subject to increase, if the District Court determined that it was necessary to permit double-bunking. (F.C.R.A. 96.)

The respondents and their *amici* have not pointed to a single provision of the Sheriff's proposal (other than cell size) that could not be adjusted, if need be, to provide a double-bunking plan that is acceptable.

B. The "Safety" Of The Inmates Will Be Preserved With Double-Bunking.

The respondents and their *amici* repeatedly argue that double-bunking at the new Suffolk County Jail at Nashua Street would pose an unconstitutional risk of harm to inmates from other inmates. In so asserting, the respondents and their *amici* simply ignore the overwhelming evidence in the record to the contrary. (J.A. 114-145, 191-216, 239-241; F.C.R.A. 679-824, 989-1034.) Instead, they recite the conclusion in the affidavit of their expert, a former Sheriff of Middlesex County, Massachusetts, who, contrary to common sense and the facts, describes the cells at the Nashua Street Jail as "hermetically sealed",[7] while pointing to not a single specific incident of violence between cellmates in his experience as a Sheriff. (The only specific incident respondents do point to occurred at the old Suffolk County Jail at Charles Street eighteen years ago under completely different circumstances. (F.C.R.A. 770-777.)) In fact, experience demonstrates that inmates may be safely double-bunked on a routine basis. (J.A. 114-145, 191-216; F.C.R.A. 679-824, 989-1034.) The evidence before the Court presents a clash of professional judgments. Such differences in professional judgments cannot be resolved by a court choosing between them. Rather, a court must defer to the judg-

[7] Respondents claim that a jail officer would be unable to hear "altercations" taking place in a locked cell. (Resp. Br. 16.) This is not true. (F.C.R.A. 784-797.)

ment of the government officials. *Youngberg* v. *Romeo*, 457 U.S. at 322; *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 971; *Bell* v. *Wolfish*, 441 U.S. at 547-48.

C. Nearly All Of The Features Of The Design Of The Nashua Street Jail Are Unrelated To The Single Cell Requirement Of The Architectural Program.

Respondents and their *amici* assert that single-celling was the "linchpin" of the design of the new jail at Nashua Street. (Resp. Br. 42.) This is simply false. Nearly all of the facilities provided for in the Architectural Program are unrelated to whether cells are single or double-bunked: six outdoor recreation decks, large indoor gymnasium with weight lifting and exercise equipment, chapel, infirmary, law library, general library, classrooms, contact visiting area, noncontact visiting, rooms and attorney/client and case worker interview rooms. Even the specifics of cell design are not peculiar to or determinative of single-celling. Each cell at Nashua Street is at least seventy square feet, only five square feet less than what this Court found acceptable for double-bunking in *Bell* v. *Wolfish*, 441 U.S. at 541, and the design of the cell door is either adequate for double-bunking as is (J.A. 202-203), or the door can be modified to provide an increased viewing area.

The Nashua Street Jail was not designed so as to safely accommodate only 453 inmates, the number of cells at the jail. In fact, the jail has the physical capacity to safely house at least 650 inmates as has been determined under American Correctional Association ("ACA") standards and the state building code.[8]

D. The Sheriff Seeks To Double-Bunk Only As Needed.

Respondents have asserted that factual circumstances have changed such that double-bunking may no longer be required,

[8] The State Building Code Appeals Board has determined that the jail can safely house 650 inmates (J.A. 239-241), as did the mock ACA audit conducted before the jail opened. (F.C.R.A. 989-1034.) Also, with 650 inmates, the jail would meet the ACA standard for common out-of-cell area per inmate.

and that once the number of male inmates committed to the Sheriff's custody exceeded the number of cells available to house them the Sheriff would automatically double-bunk all of the remaining inmates. (Resp. Br. 46-47.) Both of these assertions are inaccurate.

The number of male inmates committed to the Sheriff's custody (as is true of all jail and prison populations) fluctuates over time. This fluctuation depends upon a variety of short-term and long-term factors beyond the Sheriff's control, including the season of the year, the intensity of police efforts and the resources available to the police and prosecutors. Although the need to double-bunk may not be constant, the Sheriff seeks to have the option of double-bunking when the male population fluctuates above the number of cells available, rather than dealing with that excess number by interfering with operation of the state bail statute and state and county correctional systems as has been done until now.[9]

Also, contrary to the respondents' assertion, the Sheriff has proposed to double-bunk inmates committed to his custody only after it has been determined that they are suitable for double-bunking under the Suffolk County Jail Classification Program. (J.A. 203-206; F.C.R.A. 762-769.) If given the option to double-bunk up to 197 cells, the Sheriff would have available 200 other cells to hold male inmates.[10] This would give the Sheriff the ability to hold inmates in the type of setting — single-celled or double-bunked — that is correctionally appropriate. If the extraordinary circumstance should occur where all the available cells have been filled and there are no inmates who are suitable for double-bunking, the Sheriff would

[9] As set forth in detail in the Sheriff's Brief at 5-6, one of the means for dealing with over-population at the jail is to transfer inmates out of the county, which is costly, inefficient and serves no useful purpose. If granted the requested modification, the Sheriff will discontinue these transfers. However, regardless of the daily headcount, the Sheriff will continue to vigorously prosecute bail appeals under the Bail Appeal Project.

[10] In addition, there are 22 infirmary cells for male inmates that would continue to be single-celled.

have to find accommodation for those inmates elsewhere in the county or state correctional systems. This option contrasts sharply with the Sheriff's present inability to double-bunk any inmates even though they may be easily and safely double-bunked.

E. The Respondents Alleged "Forebearance".

Respondents and their *amici* assert that there have been "seventeen years" of "forebearance" while they waited for a new jail to be built and opened, and that they should not now, having provided that "consideration", be deprived of the single-celling consideration they received in return. (Resp. Br. 42.) This is a misstatement of the law, the facts and the relationship among the Sheriff, the inmates and the other defendants.

First, this inaccurately describes the Consent Decree as a purely private contract comprised of a sequence of *quid pro quo* exchanges of consideration. (*See* discussion at 7-9, *supra*.)

Second, the Sheriff has never had control over the funding for or the timing of the construction of a new jail, which has always been in the exclusive control of the Mayor and the City Council. The respondents and their *amici* assert, however, that a delay, not of the Sheriff's own creation, in construction of the new jail should be weighed against him.

Third, and most importantly, the respondents, as the party that obtained the consent decree ordering the construction of a new jail, had the right to seek compliance from the Mayor and City Council through an action for contempt. The respondents, therefore, had much greater control over the timing of the construction of the new jail than the Sheriff. The Consent Decree provided a strict schedule for the construction of a new Suffolk County Jail, providing that contracts be awarded within eighty-six weeks of the signing of the Consent Decree in April, 1979. (Sheriff's Cert. Pet. 20a-21a.) Construction should, therefore, have begun in early 1981. No contracts were awarded and construction did not begin in 1981. Finally, in

October, 1984, exasperated by the inability of the respondents and the Mayor and City Council to get a new jail built, the Sheriff brought suit in state court under state law to compel the Mayor and the City Council to build a new Suffolk County Jail. The Sheriff successfully pursued this litigation before a Single Justice of the Massachusetts Supreme Judicial Court and on appeal before its full bench. As a result of the Sheriff's successful initiation and pursuit of this litigation, the state legislature provided the funds to construct a new Suffolk County Jail. *See* 1985 Mass. Acts ch. 799. It was this funding, $54,000,000, and not the $15,000,000 provided for by the City of Boston under the Consent Decree, that funded construction.

On these facts it is misleading and unfair for the respondents to speak of their "forebearance" and to attempt to portray the Sheriff as a foot-dragging defendant.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Brief of Petitioners, the decision below should be reversed and an order entered directing the allowance of the Sheriff's motion to modify the Consent Decree.

Respectfully submitted,

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